

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LOUIS FLOYD,
Plaintiff,

v.

SARATOGA DIAGNOSTICS, INC., et al.,
Defendants.

Case No. 20-CV-01520-LHK

**ORDER GRANTING IN PART AND
DENYING IN PART WITHOUT
PREJUDICE PLAINTIFF'S MOTION
FOR ALTERNATIVE SERVICE**

Re: Dkt. No. 15

Plaintiff Louis Floyd filed this putative class action alleging violations of the Telephone Consumer Protection Act against Defendants Saratoga Diagnostics, Inc. (“Saratoga”) and its Chief Executive Officer Thomas Pallone. ECF No. 1 (“Compl.”). Before the Court is Plaintiff’s motion for alternative service upon Saratoga and Pallone. ECF No. 15 (“Mot.”). For the reasons discussed below, the Court GRANTS in part and DENIES without prejudice in part Plaintiff’s motion for alternative service.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff is a resident of California. Compl. ¶ 1. Defendant Saratoga is a California corporation with its principal place of business in Saratoga, California. *Id.* ¶ 2. Defendant Pallone

1 is a resident of California. *Id.* ¶ 3. Saratoga’s corporate registration with the California Secretary
2 of State identifies Pallone as Saratoga’s Chief Executive Officer, Secretary, Chief Financial
3 Officer, and agent for service of process. Mot. Ex. A. Saratoga’s corporate registration does not
4 identify any other officer or any other person authorized to accept service on behalf of Saratoga.
5 *Id.* In the same registration, the address listed for service of process on Saratoga is Pallone’s home
6 address of 12619 Paseo Olivos, Saratoga, California 95070. *Id.* at 3, Ex. A.

7 Plaintiff filed the instant case on March 1, 2020. *See* Compl. After filing the complaint,
8 during March 2020, Plaintiff’s process server made four attempts at different times of the day and
9 on different days of the week to serve Pallone and Saratoga at Pallone’s home address, consistent
10 with Saratoga’s corporate registration. Mot. at 3, Exs. A, B, C. Plaintiff was unable to effectuate
11 service during the first three visits. *Id.* at 3, Exs. B, C.

12 On March 17, the fourth visit, Plaintiff’s process server spoke with someone identified in
13 the process server’s declaration as “John Doe,” a “co-occupant” of Pallone’s home. *Id.* John Doe
14 refused to provide his name and stated that Pallone was not available. *Id.* Plaintiff’s process
15 server served a copy of the complaint and summons on this “John Doe.” *Id.* The process server
16 also mailed a copy of the documents to Pallone. *Id.* at 3.

17 Subsequently, Plaintiff made five additional attempts at service in April 2020, on different
18 days of the week and at different times of the day, but was ultimately unable to serve Pallone
19 personally. *Id.* at 4, Exs. B, C. The process server noted on several occasions that there were cars
20 in the driveway and voices inside the house. *Id.* Exs. B, C.

21 On May 20, 2020, following Plaintiff’s unsuccessful attempts to serve Saratoga and
22 Pallone, Plaintiff filed the instant motion. *See* Mot.

23 **II. DISCUSSION**

24 In the instant motion, Plaintiff moves the Court to authorize alternative service on Saratoga
25 via the California Secretary of State under California Corporations Code section 1702(a). *Id.* at 4.
26 Plaintiff further moves the Court to authorize service on Pallone by certified mail. *Id.* at 5–6. The
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1 Court addresses Plaintiff's two requests in turn.

2 **A. Service on Saratoga via the California Secretary of State**

3 Service of a complaint in federal court is governed by Federal Rule of Civil Procedure 4.
4 Specifically, Rule 4(h)(1)(A) provides that service on domestic corporations may be effectuated
5 "in the manner prescribed by Rule 4(e)(1) for serving an individual." Rule 4(e)(1) permits service
6 "following state law for serving a summons in an action brought in courts of general jurisdiction
7 in the state where the district court is located or where service is made."

8 The California Code of Civil Procedure provides for service on a corporation to an agent
9 designated for the service of process or to an officer of the company. Cal. Code Civ. Proc.
10 § 416.10(a), (b). If a corporation's agent to receive service "cannot with reasonable diligence be
11 found at the address designated for personally delivering the process," a "court may make an order
12 that the service be made upon the corporation by delivering by hand to the Secretary of State . . .
13 one copy of the process for each defendant to be served, together with a copy of the order
14 authorizing such service." Cal. Corp. Code § 1702(a); *see, e.g., FTC v. Discountmetalbrokers,*
15 *Inc.*, No. 2:16-cv-02112-ODW, 2016 WL 3751618, at *1–2 (C.D. Cal. July 13, 2016) (finding
16 service under section 1702(a) appropriate after the FTC "exhausted all methods of service short of
17 service on the Secretary of State").

18 For a court to issue such an order, it must be "shown by affidavit to the satisfaction of the
19 court that process against a domestic corporation cannot be served with reasonable diligence" on
20 the corporation's agent according to California Code of Civil Procedure sections 415.10(a),
21 415.20(a), or 415.30(a) or upon the corporation according to sections 416.10(a)–(c) and 416.20(a).
22 Cal. Corp. Code § 1702(a). *See, e.g., Freshko Produce Servs., Inc. v. ILA Prods., Inc.*, No. 1:19-
23 cv-00017-DAD-BAM, 2020 WL 2039049 at *3 (E.D. Cal. Apr. 28, 2020) (assessing whether
24 plaintiff's declarations show that service was not possible with reasonable diligence by each of the
25 listed methods); *Gambord v. Westside Gas, Inc.*, No. 17-cv-00262-BLF, 2017 WL 2774408, at
26 *2–4 (N.D. Cal. June 26 2017) (same); *Gofron v. Picsel Techs., Inc.*, No. 9-04041-CW, 2010 WL

4807096, at *1 (N.D. Cal. Nov. 19, 2010) (same). Accordingly, the Court will consider in turn whether Plaintiff has “shown by affidavit” that Saratoga “cannot be served with reasonable diligence” pursuant to California Code of Civil Procedure sections 415.10(a), 415.20(a), 415.30(a), 416.10(a), and 416.10(b). *See* Cal. Corp. Code § 1702(a). Sections 416.10(c) and 416.20(a) do not apply because Saratoga is not a bank, and Plaintiff does not allege that Saratoga has forfeited its charter or dissolved. Cal. Code Civ. Proc. §§ 416.10(c), 416.20(a). Thus, the Court need not reach those two sections.

First, section 415.10(a) allows service by “personal delivery . . . to the person to be served.” Cal. Code Civ. Proc. § 415.10(a). The nine attempts at service that Plaintiff has shown in the affidavit are sufficient to show that process cannot be accomplished with reasonable diligence by personal delivery to Pallone, Saratoga’s designated agent. Mot. at 3–4, Exs. A, B. *See Bein v. Brechtel-Jochim Grp., Inc.*, 6 Cal. App. 4th 1387, 1392 (1992) (finding three attempts at delivery to defendant’s residence sufficient to allow substitute service).

Second, section 415.20(a) allows substitute service by leaving a copy of the complaint and summons at the office or home address of the person to be served “with the person who is apparently in charge thereof” and subsequently mailing the documents to the person to be served at the same address where the documents were left. Cal. Code Civ. Proc. § 415.20(a). Plaintiff attempted service at Pallone’s home and office address, which are the same. Mot. at 3, Ex. B. Plaintiff has shown through affidavit an effort to serve Pallone by way of John Doe, a person that Plaintiff’s process server identified as Pallone’s “co-occupant” because John Doe appeared to reside at Pallone’s residence. *Id.* However, John Doe refused to identify himself, and thus Plaintiff was unable to ascertain whether John Doe was “apparently in charge,” as required for substitute service to be effective under Cal Code Civ. Proc. § 415.20(a). Mot. at 3, Ex. B; *see, e.g., Dytch v. Bermudez*, No. 17-cv-02714-EMC, 2018 WL 2230945, at *2 (N.D. Cal. May 16, 2018) (finding substitute service not effective when the recipient was not shown to be “apparently in charge”). The Court is satisfied that service under section 415.20(a) could not be accomplished

1 through reasonable diligence in light of Pallone's co-occupant's refusal to cooperate with the
2 process server and identify himself.

3 Third, section 415.30(a) allows service by mail with a return envelope, postage prepaid.
4 Cal. Code Civ. Proc. § 415.30(a). Service is complete by this method when "a written
5 acknowledgement of receipt of summons is executed, if such acknowledgement thereafter is
6 returned to the sender." *Id.* § 415.30(c). Plaintiff's motion states that the documents were mailed
7 to Pallone, apparently with no reply because Plaintiff is seeking service by alternative means.
8 Mot. at 3. However, California Corporations Code section 1702(a) requires that Plaintiff
9 document "by affidavit" his attempts to effectuate service. Plaintiff's purported attempt at service
10 by mail is not mentioned in any of the process server's declarations, nor is it substantiated in any
11 other affidavit filed with Plaintiff's motion. Accordingly, the Court finds that Plaintiff has not
12 adequately established *by affidavit* his attempts to substantiate service by mail pursuant to section
13 415.30(a).

14 Fourth, section 416.10(a) allows service on a corporation through its agent. Cal. Code Civ.
15 Proc. 416(a). As described above, Plaintiff's affidavit shows nine unsuccessful attempts to serve
16 Pallone, Saratoga's agent. Mot. at 3–4, Exs. A, B. Thus, Plaintiff's affidavit has shown that
17 process cannot be served on Saratoga by this method of service with reasonable diligence.

18 Fifth, section 416.10(b) allows service to the "president, chief executive officer, or other
19 head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant
20 treasurer, a controller or chief financial officer, a general manager, or a person authorized by the
21 corporation to receive service of process." Cal. Code Civ. Proc. § 416.10(b). Plaintiff's affidavit
22 shows attempts only to serve Pallone. Mot. at 3–4, Ex. B. Saratoga's corporate registration
23 identifies Pallone as Saratoga's "Chief Executive Officer," "Secretary," "Chief Financial Officer,"
24 and "Agent for Service of Process." *Id.* Saratoga's corporate registration identifies no other
25 officer, general manager or person authorized to receive service of process for Saratoga. *Id.*
26 Thus, Plaintiff's nine attempts to serve Pallone show that process cannot be served on Saratoga by
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1 this method of service with reasonable diligence. *See, e.g., Gambord*, 2017 WL 2774408, at *3
 2 (finding section 416.10 satisfied when plaintiff was unable to serve the lone identified officer).

3 In sum, although the affidavits Plaintiff filed show substantial efforts to serve Saratoga,
 4 Plaintiff has not established by affidavit his attempts to effectuate service via mail to Pallone at his
 5 address according to section 415.30(a). Accordingly, the Court DENIES without prejudice
 6 Plaintiff's request to serve Saratoga via the California Secretary of State. Plaintiff may cure the
 7 deficiency by refiling a motion that includes an affidavit that shows that service by mail under
 8 section 415.30 is not possible with reasonable diligence.

9 **B. Service on Pallone by Certified Mail**

10 As to individual defendants, Federal Rule of Civil Procedure 4(e)(1) allows for service on
 11 an individual "following state law for serving a summons in an action brought in courts of general
 12 jurisdiction in the state where the district court is located or where service is made."

13 California Code of Civil Procedure section 413.30 allows a court to "direct that summons
 14 be served in a manner which is reasonably calculated to give actual notice to the party to be
 15 served." "To satisfy constitutional norms of due process, the alternative method of service must
 16 be 'reasonably calculated, under all the circumstances, to apprise the interested parties of the
 17 action and afford them an opportunity to present their objections.'" *Facebook, Inc. v. Banana Ads,*
 18 *Inc.*, No. 11-3619-YGR, 2012 WL 1038752, at *1 (N.D. Cal. Mar. 27, 2012) (quoting *Rio Props.,*
 19 *Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1016 (9th Cir. 2002)).

20 Courts within this district have authorized service upon individuals via certified mail when
 21 personal service was unsuccessful. For example, a court permitted service by certified mail under
 22 California Code of Civil Procedure section 413.30 when the plaintiff alleged five unsuccessful
 23 attempts at addresses found in corporate filings and six attempts at a personal address, a gated
 24 home with an intercom. *Lagree Techs., Inc. v. Spartacus 20th L.P.*, No. 17-cv-00795-JST, 2017
 25 WL 1374598, at *1 (N.D. Cal. Apr. 17, 2017). The Court found that the plaintiff had adequately
 26 alleged the defendant "lived in the gated property and evaded process servers." *Id.* at *3.

Therefore, the Court determined that certified mail was a “reasonable alternative likely to provide [defendants] with actual notice.” *Id.*

Here, Plaintiff’s process server has made nine unsuccessful attempts to serve Pallone over a two-month period, at different times of the day and on different days of the week. Mot. at 3–4, Ex. C. The process server noted on several occasions that there were cars in the driveway and voices inside the house. *Id.* Ex. C. Additionally, on March 17, 2020, the process server served a copy of the complaint and summons on “John Doe,” who refused to identify himself and who stated that Pallone was “not available,” at Pallone’s residence. *Id.* at 3, Ex. C.

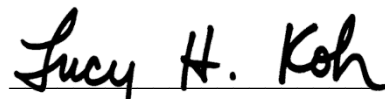
On this basis, Plaintiff has adequately alleged that Pallone lives in the property and has avoided service. Therefore, certified mail appears “reasonably calculated to give actual notice to the party to be served.” Cal. Code Civ. Proc. § 413.30; *see Lagree Techs., Inc.*, 2017 WL 1374598, at *1.

III. CONCLUSION

For the foregoing reasons, the Court DENIES without prejudice Plaintiff’s motion to serve process on Saratoga via the California Secretary of State. The Court GRANTS Plaintiff’s motion to serve Pallone by certified mail.

IT IS SO ORDERED.

Dated: June 5, 2020



LUCY H. KOH
United States District Judge